



# Seattle City Attorney

Thomas A. Carr

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Attorney General Rob McKenna  
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Dear Mr. McKenna, *Rob*

Thank you for the opportunity to comment on the Attorney General's proposed Public Records Act (PRA) model rules. I appreciate the effort that your office has put into drafting the rules and obtaining comment from a broad range of sources. You have done an extraordinary job of balancing the public's right to know with the need to run government efficiently and effectively. I commend you on this fine work.

As the largest city in the state Seattle stands in a unique position with respect to public disclosure. Our city leaders are committed to open government. I am proud of our record of cooperation and openness. I would like to take this opportunity to bring some of our experience to bear on your proposed model rules. While I believe that they are excellent, I do believe that there are a few areas that could be improved. For your convenience, I will generally present these comments in the order they appear in the proposed rules. If you have questions, please feel free to contact me by telephone or e-mail.

**WAC 44-14-01001 (Pp. 5-6)--Scope of coverage of the PRA:** I am concerned about the statement that an entire governmental entity (such as a county or city) is one "agency" under the PRA, and so must have a single point of contact who answers requests for all departments (See WAC 44-14-02002, p. 9). Neither the definition of "agency" in the PRA or the new requirements of RCW 42.17.253 support this interpretation. The City of Seattle has a public disclosure officer for each department or office. That officer's familiarity with that department's records enhances the officer's ability to provide thorough and efficient responses. We are able to promptly provide records using this system. We also believe that moving to a single point of contact for a governmental entity of about 10,000 employees would require us to create a new office and hire additional staff.

**WAC 44-14-03001 (p. 12)-- "Unbridled searches" and home computers:** I appreciate your clarification that the PRA does not allow "unbridled searches" of either public agency property or an agency employee's home computer that may contain public records. I agree that it is a good idea to encourage public employees to maintain a separate directory for work-related records stored on their home computers, and to encourage the eventual transfer of all public records to agency computers.

**WAC 44-14-03002 (p. 13)--Times for inspection and copying:** I suggest that this section be expanded to make clear that a requester may be required to make reasonable advance arrangements with an agency before inspecting records. This clarification would actually benefit

requestors. A requestor who shows up and demands any record requiring even rudimentary research is generally wasting his or her time, because the requestor will likely be required to make a second trip when the record can be found. The PRA allows agencies to fulfill their public records obligations in a way that does not interfere with efficient governmental operations. Thus, they are not required to drop everything to find a record. Advance notification often would benefit everyone, as disclosure is not unreasonably delayed..

**WAC 44-14-03005 (p. 15)--Retention of Records:** The retention of e-mails is a difficult subject with which we have struggled here in Seattle. We are all plagued by junk mail. Moreover, most e-mail messages are mundane and of no interest beyond a short period of time. The City of Seattle has a policy on e-mail retention, which we believe meets both the letter and spirit of the PDA. I would suggest that you consider proposing revising records retention schedules under RCW 4.14 to provide a more flexible rule allowing for deletion of non-substantive e-mails, with a requirement to retain any substantive e-mails for a longer period. It is not practical for governmental entities to retain all e-mail messages for years. This would require the addition of substantial storage capacity and increase costs. The State Records Retention Schedule recognizes that most e-mail systems are designed as communications rather than storage systems. It states that e-mail messages should be retained in e-mail format only as long as they are being worked on or distributed. E-mail messages with retention value are to be printed or stored electronically on an individual basis according to their retention value (See State Records Retention Schedule, "Electronic Information--General," at p. 64). Agencies should continue to follow this practice, at least until e-mail systems with more sophisticated storage and retrieval capacity become generally available at reasonable prices.

**WAC 44-14-040 (p. 18)--30-day limit to claim records:** I support the establishment of a firm time limit for requestors to claim or inspect records made available at their request. I also appreciate the model rule recommending a firm time limit for responding to requests for clarification (See WAC 44-14-04003, p. 24).

**WAC 44-14-040 (p. 18) and WAC 44-14-04003 (p. 26)--Third-party notification:** I appreciate your effort at setting guidelines for third-party notification. I am, however, concerned about the suggestion that an agency should provide third-party notification only if it believes a record is *arguably* exempt from disclosure. The Courts have held that third-party notification to an affected party is at the agency's *option*, without limitation. See *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn. 2d 734 (1998). The PRA does not give an agency the authority to decide on behalf of a third party to whom it has given notification whether there is a basis for the third party to enjoin release. This is the third party's right and responsibility. We should make every effort to protect a person's right to be heard, without impairing the requestor's right to the records.

**WAC 44-14-04001 (p. 20)--What constitutes prompt disclosure:** I support the concept of giving guidance on what constitutes "prompt disclosure" and of the recognition that although agencies must fulfill their public disclosure obligations they have other important functions to perform as well. It would be best if the model rules explicitly reference AGO 1991 No. 6, in which your office opined that "promptness" under the PRA depends upon the circumstances, including the nature of the request and the agency's other essential functions.

**WAC 44-14-04003 (p. 24)--Requests for clarification:** I am concerned about the model rules' suggested limitation of requests for clarification to situations when the request is objectively unclear. I disagree strongly with the statement that requests for clarification under other circumstances always delay access to public records. In Seattle our goal is to provide the requestor with the records that they seek. Many requestors will begin with a request that is very broad, because they do not trust government nor are not sure what records they really want. We find that a polite inquiry about the true nature of the request can lead to more direction from the requestor and a quicker and less costly production from the city. Used in this way, a request for clarification facilitates access to records more promptly. I believe the model rules should allow and encourage such assistance to requesters.

**WAC 44-14-04003 (p. 24)--Explanations of time estimates:** I agree that agencies may voluntarily provide a reason for their estimates of time to provide records, but believe the model rules should emphasize that this is not required under the law. *See Ockerman v. King County*, 102 Wn.App. 212 (2000).

**WAC 44-14-05005 (p. 29, 30)--Redactions:** I agree with the model rules' statement that an agency generally must redact the exempt part of a record and disclose the rest. However, I suggest that the model rules reference Court-created exceptions to this rule for certain kinds of records, such as employee performance evaluations that don't discuss specific instances of misconduct (*Dawson v. Daly*, 120 Wn.2d 782 (1993)).

**WAC 44-14-050, WAC 44-14-05001 and WAC 44-14-05002 (pp. 33-36)--Electronic records:** Given the increasing prevalence of electronic records, I appreciate your attempt to provide guidance concerning requests for records stored in electronic format. I suggest that the list of non-exclusive factors to be considered in deciding whether to provide customized access should be permissive ("may") rather than mandatory ("shall"), since the law does not require customized access (See p. 34 and p. 36).

**WAC 44-14-06002 (p. 39)--Whether exemptions are permissive or mandatory:** I am concerned about the statement that all exemptions are permissive rather than mandatory. Privacy-related exemptions may well be mandatory. These exemptions apply only if disclosure of the record in question would constitute tortious invasion of privacy. *See RCW 42.17.255*. If

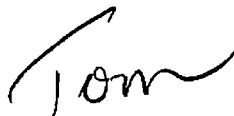
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disclosure of a record would constitute a tortious act by the agency, its exemption from disclosure may well be mandatory.

**WAC 44-14-06002 (p. 39--Attorney-client privilege:** I understand that you believe that the attorney-client privilege for public-sector lawyers under RCW 42.17.260(1) and RCW 5.60.060(2) as interpreted by *Hangartner v. Seattle*, 151 Wn.2d 439 (2004), is the same as it is for lawyers serving clients in the private sector, and governed by the same body of case law. I believe that the model rules themselves should explicitly state this in addition to referencing your guidance document. I am concerned that any attempt to describe the privilege in other terms could result in a court finding that the privilege for public-sector lawyers is different or narrower than that applied to lawyers in private practice. I am very concerned about the misapprehensions that have arisen concerning *Hangartner* and the scope of the privilege. I believe that the model rules should set these misapprehensions to rest. I would also like to draw your attention to what appears to be a typographical error in the "controversy" section. The model rules in footnote 11 refer to the Washington Supreme Court's decision in *Dawson v. Daly*, 120 Wn.2d 892. The *Dawson* Court defined a "controversy" as "**completed**, existing, or reasonably anticipated litigation." The model rules changed the word "completed" to "contemplated," which duplicates the word "anticipated" in the next sentence and would exclude any privilege relating to past litigation.

Again, thank you for the opportunity to comment on the proposed rules.

Very truly yours,

A handwritten signature in black ink, appearing to read "Tom", with a stylized flourish extending from the end.

Thomas A. Carr  
Seattle City Attorney